



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



PLEASE NOTE: Effective September 1, 2003, the street address is 29 Hazen Drive.

In re: Lisa Howard

PO Box 200
Farmington, NH 03835

NOTICE OF DECISION ON
MOTION FOR RECONSIDERATION

Administrative Fine No. AF 02-034

Background

On October 10, 2002, the Water Division ("the Division") issued a Notice of Proposed Administrative Fine and Hearing No. 02-034 ("the Notice") to Lisa Howard for unauthorized filling and dredging in wetlands and for failing to comply with Administrative Order No. WD 2002-14 ("the Order") for property located at the corner of Chipmunk Lane and Blueberry Drive, Farmington, NH ("the Property"). The Division sought three fines totaling \$11,500.

The hearing was held on January 6, 2003. The Notice of Decision ("the Decision") was issued on March 10, 2003, and imposed a fine in the amount of \$11,500 for dredging and filling in wetlands on the Property and for failing to comply with the Order.

The motion for reconsideration ("the Motion") was timely filed by Ms. Howard on April 9, 2003. The Division filed a response ("the Response") on April 30, 2003.

Discussion

In the Decision, a fine was imposed against Ms. Howard for violating RSA 482-A:3, I by dredging and filling in wetlands on the Property, and for violating RSA 482-A:14, III by failing to comply with the Order. (*Decision*)

RSA 482-A:3, I states that no person shall excavate, remove, fill, dredge, or construct any structure in or on any bank, flat, marsh, or swamp in or adjacent to the waters of the state without a permit from DES.

RSA 482-A:14, III states in part that failure, neglect or refusal to comply with this chapter or rules adopted under this chapter, or an order or condition of a permit issued under this chapter, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by this chapter shall be deemed violations of this chapter.

This case involves wetlands violations on the Property. When DES inspected the Property on August 16, 2001, staff discovered that approximately 1,728 square feet of the stream and associated wetlands at the corner of Chipmunk Lane and Blueberry Drive on the Property were filled; approximately 1,046 square feet of two drainage swales adjacent to or on the Property were filled; and a pond approximately 2,500 square feet was excavated in wetlands. (*Record*)

On September 6, 2001, DES issued Letter of Deficiency WET 2001-44 ("the LOD") to Ms. Howard to address the wetlands violations. Ms. Howard did not comply with the LOD. Subsequently, on April 1, 2002, DES issued Administrative Order No. WD 2002-14 to Ms. Howard requiring her, in part, to remove 1,728 square feet of fill from the stream at the intersection of Chipmunk Lane and Blueberry Drive, remove the 546 square feet of fill blocking a culvert to allow water to flow from a swale along Blueberry Drive, and submit restoration plans for the pond. Ms. Howard failed to comply with the Order. Subsequently, DES issued the Notice and the hearing was held on January 6, 2003. (*Record*)

In the Motion, it appears that Ms. Howard is arguing that because she complied and cooperated with DES that no fine should be imposed. (*Motion, Paragraphs 3 and 41*) The remainder of the Motion consists of a restatement of evidence and testimony presented at the hearing. Ms. Howard does not provide any additional evidence to consider.

In the Response, the Division argues that the doctrine of collateral estoppel bars Ms. Howard from disputing the facts in the Order. (*Response, Paragraph 13*) The Division asserted that Ms. Howard could have appealed the Order to DES for reconsideration and if dissatisfied with the decision on reconsideration, she could have filed an appeal to the Wetlands Council where she had the opportunity for a hearing and to present testimony and evidence. (*Response, Paragraphs 8 and 9*) The Division emphasizes that Ms. Howard failed to comply with the Order, to seek reconsideration of the Order, or to appeal the Order, and maintains that "the Order is, therefore, a final decision and all rights of appeal have expired." (*Response, Paragraphs 10 and 11*) The Division further notes that the Notice cites Ms. Howard for the same violations as determined in the Order and that the issues and findings in the Order are the same as in the Notice. (*Response, Paragraphs 12, 17 and 18*)

The Order was issued on April 1, 2002. Had Ms. Howard disagreed with the facts stated in the Order, she could have appealed it to DES for reconsideration. If she was not satisfied with the decision on reconsideration, she could have appealed the decision to the Wetlands Council. Ms. Howard did not file an appeal nor did she comply with the Order. Ms. Howard's failure to appeal the Order operates to legally bar the issues in this case from being reopened. Further, there is no objective reason to challenge the issues because the record established that Ms. Howard was aware of the Order when it was issued and she did not attempt to challenge it at that time.

In addition, the basis of the administrative fine is that unpermitted work occurred in wetlands jurisdiction. Although Ms. Howard argues that she complied and cooperated with DES, it is clear from the record that when DES inspected the Property, staff observed unpermitted dredging and filling on the Property. In order to impose an administrative fine, the Division must prove by a preponderance of the evidence that the violations occurred. In this case, the Division

proved that Ms. Howard violated RSA 482-A:3, I by dredging and filling in wetlands on the Property, and violated RSA 482-A:14, III by failing to comply with the Order.

There is no basis on which to overturn the Decision. The Motion has not provided any additional evidence as to why the Decision is in error. Therefore, the Division has met its burden in proving the violations alleged in the Notice.

Decision

For the reasons discussed above, the Motion is denied. The total fine of \$11,500 shall be paid within 30 days of the date of this Notice of Decision on the Motion for Reconsideration or at Ms. Howard's election, in five equal payments of \$2,300 in accordance with the following schedule:

First payment due:	December 2, 2003	Fourth payment due:	March 3, 2004
Second payment due:	January 2, 2004	Fifth payment due:	April 2, 2004
Third payment due:	February 2, 2004		

Fine payments shall be by certified check or money order payable to "Treasurer - State of NH" and sent to the attention of the Legal Unit, DES/Office of the Commissioner, 29 Hazen Drive, Concord, NH 03301.

So Ordered,

Date: Oct. 16, 2003

COPY

Michael P. Nolin
For Michael P. Nolin
Commissioner

cc: Farmington Conservation Commission
Farmington Board of Selectmen
Jennifer Patterson, DOJ/EPB
Harry T. Stewart, P.E., Director, Water Division
Mark Harbaugh, DES Compliance Attorney
Susan Weiss Alexant, DES Hearings and Rules Attorney
Gretchen Rule, DES Legal Unit
Marjory Swope, NHACC